

is applicable to the facts of this case because here, there was no doubt at all as to the offences which the appellant had committed over a period of time with different accomplice or accomplices and on various victims. In fact, the appellant had no hesitation in pleading guilty to all the four charges of robberies with a deadly weapon when he appeared before the Sessions Court at Johor Bahru.

Nor did the first limb of section 302(i) of the CPC, in our opinion, apply inasmuch as the appellant has not been charged with the "same offence" in the Sessions Court and the High Court. In the Sessions Court the appellant was charged with robberies with a deadly weapon, *to wit*, a revolver under section 392 and punishable under section 397 of the Penal Code. Whereas in the High Court the charges were under the Internal Security Act 1960. A comparison of these charges would indicate that the essential ingredients are not the same as armed robbery can be regarded as an aggravated form of theft causing fear of instant death or hurt on the intended victim voluntarily by means of a deadly weapon. On the other hand, the essential ingredients under the Internal Security Act 1960 are simply control of firearms and/or ammunitions without lawful authority. Since learned counsel for the appellant is unable to bring his case within the first limb of section 302(i) of the CPC the main ground of appeal therefore fails.

It cannot be disputed that charges under sections 392 and 397 of the Penal Code are triable in the Sessions Court and that the court is not competent to hear charges under section 57 of the Internal Security Act 1960 which carries the mandatory death penalty. Only the High Court can pass such a sentence in law. It follows that when the appellant was charged under section 57 of the Internal Security Act 1960 the second time he can only be tried in the High Court. It seems that the plea of *autrefois convict* would also fail by reason of section 302(iv) of the CPC. But it is pertinent to note that this sub-paragraph confers a discretion on the Public Prosecutor to charge the appellant on any other offence or offences constituted by the same acts which he might have committed, and we have not heard any submission by learned counsel for the appellant that this discretionary power had been wrongly or improperly exercised. In fact, no ground of appeal had been raised challenging the exercise of this discretion by the Public Prosecutor. Now, sub-paragraph (iv) of section 302 of the CPC reads:

"A person acquitted or convicted of any offence constitut-

A ed by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he was subsequently charged."

B Having disposed of the plea of *autrefois convict* which, in our judgment, did not apply to the facts of this case, we turn to deal with the other grounds based on the merits of the appeal.

Order accordingly.

C Solicitors: *Jalil, Hassan & Partners.*

D
**LYE THAI SANG & ANOR. v. FABER MERLIN
(M) SDN. BHD. & ORS.**

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah S.C.JJ.) July 2 & August 30, 1985]

E [Kuala Lumpur — Supreme Court Civil Appeal Nos. 79 & 90 of 1984]

Practice and Procedure — Appeal heard and disposed of by Supreme Court — Whether Supreme Court has power to review earlier decision — Rules of Supreme Court, 1980, r. 70 — Courts of Judicature Act, 1964, ss. 41, 42, 44, 67 & 69 — Federal Constitution, art. 128(3).

F *Constitutional Law — Supreme Court — Jurisdiction of — Whether Supreme Court has power to review earlier decision — Federal Constitution, art. 128.*

G In this case the applicants applied by motion for an order or orders that the judgment of the Supreme Court in the Civil Appeals, in which they were respondents, be reviewed. The judgment of the Supreme Court is reported at [1985] 2 M.L.J. 380.

H **Held:** where an appeal has been heard and disposed of by the Supreme Court, the Supreme Court has no power to review the case, that is, to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a rehearing is only to the extent provided by section 49 of the Courts of Judicature Act 1964.

SUPREME COURT.

I *Humfrey Ball* (Arthur Lee and Gary Yuen with him) for the applicants/respondents in the appeal.

Sri Ram and *S. Balarajah* for the respondents/appellants.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court): Lye Thai Sang and Leong Kum Weng, the respondents in Supreme Court Civil Appeals Nos. 79/84 and 90/84, in respect of which the Court on May 18, 1985 allowed the appeals with costs, applied by way of motion for an order or orders that the judgment given in the said appeals be reviewed.

Mr. Humfrey Ball appearing on behalf of the applicants submitted that these applications were made pursuant to Rule 70 of the Supreme Court Rules. Rule 70 of the Supreme Court Rules relates only to form of application. Under this rule, all applications to the Court shall, unless otherwise provided, be made by motion.

He also submitted that, in the light of section 69 of the Courts of Judicature Act, 1964 read together with Article 118(3) of the Federal Constitution, the Supreme Court has unlimited power to review its decision.

Basically the applicants are invoking the provisions of the Courts of Judicature Act, 1964, (hereafter called the Act), in particular sub-sections (3) and (4) of section 69 of the Act, to support their argument that this Court has such a power. For easy reference, the whole of section 69 is reproduced as follows:-

"69. (1) Appeals to the Supreme Court shall be by way of re-hearing, and in relation to such appeals the Supreme Court shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Supreme Court.

(4) The Supreme Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision."

Section 69 is one of the sections dealing with

appeals. Other relevant provisions are sections 50 to 66 in respect of the Supreme Court's appellate jurisdiction in criminal appeals and sections 67 to 73 in respect of civil appeals. As can be seen, even from the marginal note to section 69, it is abundantly clear that the object of sub-section (1) of this section is to vest the Supreme Court with certain powers and duties exercisable in relation to and during the course of hearing of appeals before it. One of the powers is a discretionary power to receive further evidence. It is also abundantly clear that the purpose of sub-sections (2) and (3) of section 69 is to regulate the applications for and the admission or receipt of further evidence in respect of an appeal properly before the Court.

Consequently, sub-section (4) of section 69 of the Act confers power upon the Supreme Court (a) generally to draw inferences of fact from the evidence appearing in the record of appeal, and (b) specifically to draw inferences of fact on new or further evidence admitted pursuant to sub-sections (2) and (3) of section 69 and give any judgment and/or make any order which ought to have been given or made by the High Court.

The question before the Court is, therefore, whether sub-section (4) can be construed to confer an unlimited power on the Supreme Court to review, meaning to re-open, re-examine and re-consider with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.

Our view is that there is no merit in the contention made by the applicants. Sub-section (4) of the Act cannot be construed to mean that it confers unlimited power upon the Supreme Court to re-open, re-hear or re-examine, if necessary, to reverse or set aside a judgment given in an appeal already heard and disposed of by it. So to construe would indeed not only be contrary to the clear meaning to the words used in section 69 but also contrary to Article 128(1) of the Federal Constitution.

Article 128(3) states that "the jurisdiction of the Supreme Court to determine appeals from a High Court or a judge thereof shall be such as may be provided by federal law."

The Courts of Judicature Act, 1964 is such a law made pursuant to Clause (3) of Article 128.

With respect to appeals, section 41 of the Act

provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the Court. Read in the light of section 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.

Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

For reasons we have stated, this application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Arthur Lee & Co.; Balarajah & Co.*

UNITED MANUFACTURERS SDN. BHD. (IN RECEIVERSHIP) v. GURU TIMBER SDN. BHD. & ANOR.

[O.C.J. (George J.) September 10 & 25, 1984]
[Kuala Lumpur – Civil Suit No. C 1369 of 1982]

Hire Purchase – Failure to pay instalments – Both hirer and guarantor liable.

Practice and Procedure – Pleadings – Plaintiff to reply to counterclaim of defendant within 14 days – Does not affect right of the plaintiff to proceed with Order 14 application – R.H.C. 1980, O.14 & O.18 r.3.

In this case the plaintiff sold three tractors to the first defendant on the guarantee of the second defendant under separate hire-purchase agreements. The hirer fell into arrears of the monthly rental. A new schedule of payments was arrived at between the parties. The hirer again defaulted in payment of agreed amounts. The plaintiffs then brought an

A action against the hirer and his guarantor. The first defendant raised the plea that plaintiffs failed to rectify defects in tractors and rescinded the contract. He also counterclaimed against the plaintiffs for the damages arising from the alleged breach of warranty. The first defendant also raised the preliminary objection that there was inordinate delay on the part of the plaintiffs to reply to the counter claims of the first defendant. The Senior Assistant Registrar at the hearing of summons-in-chambers dismissed the claim of the plaintiffs. The plaintiffs appealed to the judge in chambers.

B Held, allowing the appeal: (1) the counter claim was a sham defence. Defects in tractors were of a minor nature. They did not amount to a breach of the alleged warranty;

C (2) the plaintiffs were under receivership, the staff had been reduced from 320 to only 32, hence there was delay in taking out Order 14 proceedings;

(3) the fact that a reply and defence to counter claim was filed does not have the effect of precluding the plaintiff from proceeding with the Order 14 application.

D *Cases referred to:*

- (1) *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co. Ltd.* [1969] 2 M.L.J. 98.
- (2) *Societe Des Etains De Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267.
- (3) *McLardy v. Slateum* (1890) 24 Q.B.D. 504.

E CIVIL SUIT.

Loh Lee Choo for the plaintiffs/appellants.
William J.K. Leong for the defendants/respondents.

F *Cur. Adv. Vult.*

G George J. : By way of a separate hire purchase agreement for each tractor the 1st defendant purchased from the plaintiffs three tractors, each of the agreements being dated March 3, 1979. The 2nd defendant guaranteed the payment of the agreed monthly rentals in respect of each of the hire purchases. In respect of each of the agreements, the 1st defendant fell into arrears of the agreed monthly rentals.

H On or about March 25, 1981 the 1st defendant agreed to settle the outstanding amounts then due in the terms of a new schedule of payments arrived at between the parties pursuant to which certain payments were made after which the 1st defendant defaulted in payment of the other agreed amounts.

I The plaintiffs' claim against the 1st defendant is on the basis of the repudiation of the hire purchase agreements. The claim against the 2nd defendant is on the guarantees. There is also a claim against the 1st defendant in respect of the cost of certain spare parts sold to the 1st defendant and in respect of repair services rendered.